# THE CONSTITUTIONAL ASPECT OF THE PROTECTION OF WOMEN IN INDUSTRY

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## I

A BRIEF survey of the American legislation for the protection of women in industry will facilitate the discussion of the constitutional principles by which the action of legislatures is controlled. The following types of statutes should be distinguished:

1. Those which provide that no person shall be precluded, debarred or disqualified from any lawful occupation, profession or employment on account of sex. Illinois and Washington so provide by statute (making exceptions for military employment and public office), while California enacts the same principle in the form of an article of her constitution. A statute of this kind can at most have the effect of removing some supposed bar existing by virtue of law of custom. The statute of Illinois was in fact the consequence of a decision of the supreme court of that state which denied a woman a license to practise law, and against which the Supreme Court of the United States had been appealed to in vain.[1] The incorporation of the principle into the constitution will, on the other hand, control future as well as past legislation, and may prove an embarrassment in the way of carrying out other protective policies. The wording of the provisions does not seem to affect any possible disqualifications by reason of marriage and coverture.

2. Those which bar women from certain employments altogether. It is noteworthy that only five days after removing the disabilities of sex with reference to employment in general, Illinois prohibited the labor of women in coal mines, and the same prohibition is now found in the principal mining states

[1] *Cf. in re* Bradwell, 55 Ill. 535, Bradwell *v.* Illinois, 16 Wallace, 130, 1873.

(Indiana, New York, Pennsylvania, Washington, West Virginia, Wyoming). The other employment from which women are sometimes debarred (in about a dozen states) is the dispensing of intoxicating liquors. So under the liquor-tax law of New York (§31) no woman not a member of the keeper's family may sell or serve liquor to be consumed on the premises. In California, under the constitutional provision above quoted, an ordinance making it a misdemeanor for a female to wait on any person in any dance cellar or barroom was held invalid,[1] but later on an ordinance prohibiting the sale of liquor in dance cellars or other places of amusement where females attend as waitresses was sustained,[2] as was also the refusal of licenses to those employing females,[3] upon the ground that the clause of the constitution did not prevent the prescribing of conditions upon which the business of retailing liquor shall be permitted to be carried on. The court evidently felt that the object to be gained justified a narrow construction of the constitution.

3. Statutes which prohibit the employment of women in cleaning machinery while in motion, or in work between moving parts of machinery. Such legislation, according to the digest of labor laws prepared by the United States Commissioner of Labor in 1907, is found in Missouri and West Virginia.

4. Statutes which compel the provision of sanitary and other conveniences for females in industrial or mercantile establishments. Beside certain obvious requirements in the interest of decency, particular mention should be made of the legislation found in the great majority of states, under which seats must be provided for female employes and their use permitted when the women are not engaged in active duty.

5. Statutes which prohibit night work in various kinds of industrial establishments. They are to be found in about half a dozen states (Connecticut, Indiana, Massachusetts, Missouri, Nebraska). A corresponding provision of the law of New York was declared unconstitutional.[4] The only authority cited was the case of Lochner *v.* New York;[5] and it should be noticed

[1] *In re* Maguire, 57 Cal. 604. [2] *Ex parte* Hayes, 98 Cal. 556.

[3] Foster *v.* Police Commissioners, 102 Cal. 483.

[4] People *v.* Williams, 189 N. Y. 131. [5] 198 U. S. 45.

that at the date of the decision (June, 1907), the supreme court of the United States had not yet promulgated its very liberal views as to the power to control women's work which subsequently appeared in the case of Muller *v.* Oregon.[1] The New York Court treated the prohibition also as a sanitary measure exclusively, and did not advert to possible moral considerations. The decision stands, however, unrevoked, and the law of New York must be treated as annulled.

6. Statutes which in other respects limit the hours of labor of female employes. The establishments to which the laws apply vary, as they do in the case of night work, manufacturing establishments being the most common. The number of states having such laws has rapidly increased in recent years, there being now over twenty in all parts of the country, not counting those which apply only to females under age, or those which forbid only the compelling of work for longer hours. The number of hours is usually ten per day, often with a reduction for the total of the week, so as to make a shorter day on one day of the week; but sometimes also providing only a maximum number for the entire week.

## II

When we compare these statutes enacted on behalf of women workers with the general body of labor legislation, we note the almost total absence of any interference with purely economic arrangements: there is nothing analogous to store-order or weekly-payment acts applying to women in particular, nor any attempt to control the rate of wages. The most controversial field of labor legislation from the constitutional point of view has thus been avoided.

Health, safety and morals have always been undisputed titles of the police power, where it is a question of protecting the public at large. The control of the internal arrangements of the workshop in the interest of the employes, who, in theory, entered into it voluntarily, was the great extension of the power of the law achieved by the English factory acts. It is a strange

[1] 208 U. S. 412.

anachronism when we find American courts in the end of the nineteenth century questioning the legitimacy of restrictive legislation intended only for the benefit of the employed, who may be willing to assume the risk,[1] but it is true that it was not until after the middle of the nineteenth century that the English law sanctioned sanitary requirements on behalf of adult employes, and the singling out of adult women for the purpose of such protection met with opposition.[2] At present the validity of the sanitary and safety provisions of factory acts is, in principle, unquestioned, and opponents of such acts have to scrutinize them for constitutional defects in non-essential features. Where such provisions apply to women in particular it is generally because the danger or evil arises out of conditions peculiar to the sex.

The limitation of hours of labor is at present the most conspicuous phase of restrictive labor legislation. As applied to men, it has in general been confined to special occupations. In some cases the reason why they were singled out is not apparent. This is true of the laws of some southern states with regard to the employes of cotton or woolen mills, which have not been passed upon by the courts of last resort; in other cases, the inducing motive was the consideration of public safety, as in the limitation of hours of trainmen; in the remaining cases—those of miners and bakers—the legislation sought to justify itself as a measure for the protection of the health of the employes.

It is well known that there is a conflict of judicial opinion regarding the validity of this legislation, strongly emphasized by the vacillating attitude of the Supreme Court of the United States, which sustained an eight-hour day for miners and annulled a ten-hour day for bakers.[3] The inconsistency of these two rulings is particularly striking, since it is generally believed that the occupation of bakers is exceptionally unsanitary, and was singled out as such under the delegated powers of regulation committed to the federal council by the German trade code,

[1] *In re* Morgan, 26 Col. 415; *in re* Jacobs, 98 N. Y. 98.

[2] Hutchins and Harrison, *History of Factory Legislation*, p. 187.

[3] Holden *v.* Hardy, 169 U. S. 366, Lochner *v.* New York, 198 U. S. 45.

while the mining of coal under modern conditions is regarded as remarkably immune from occupational disease. In Colorado the eight-hour day for miners was declared unconstitutional.[1]

The difficulty which American courts have experienced with regard to the treatment of hours of labor is easily understood. They assume the existence of a constitutional principle which protects what is called the freedom of contract. This means that the state must leave the economic side of the labor contract to the free bargaining of the parties concerned; it means from the point of view of the employer that his business is not to be regulated by law in order to secure satisfactory terms to the employe, as the railroad business is regulated to secure fair terms to the shipper or the traveling public; from the point of view of the employe it means that he is free to make the most of his earning capacity, and to work as long as he pleases, or rather, conceding the limited sphere of the police power, as long as is consistent with proper standards of health and safety. The movement for the eight-hour day has, generally speaking, been frankly an economic movement, designed to advance the workman in the social scale, to give him time for recreation, culture, the enjoyment of his home, everything, in short, that is supposed to go with rational leisure, and it has generally been accepted as a principle of American constitutional law, that this consummation was not to be brought about by legislative compulsion. The state was to further the movement only in so far as it had the right to dictate the conditions of employment on work done for the public.

Notwithstanding the recognition of this constitutional limitation, there have at all times been large sections of organized labor who would have been glad to enlist the power of the law in the struggle for the shorter workday, and who would welcome any reduction on constitutionally valid grounds as a step in that direction. Hence the appeal for the eight-hour day on public works; and hence the appeal to the police power of the state for the purpose of shortening hours of labor.

There has always been greater difficulty in furnishing legal

[1] *In re* Morgan, 26 Col. 415.

protection against the risk of disease in industrial employment than against the risk of accident. The common-law liability of the employer for illness contracted by the employe in consequence of defective arrangements may be regarded as a negligible factor, owing to the difficulty of legally proving the cause of disease and to the operation of the doctrine of assumption of risk. It is only since 1906 that a statutory liability for disease has, within a very narrow range, been established in England, and such a thing is not even agitated in this country. For protection against occupational disease and its consequences our laws rely upon preventive regulation entirely. No system of protective devices, however, can banish altogether the baneful effect of certain occupations upon the general health and strength of the worker, and it is against these inevitable risks that reliance must be placed upon diminishing the amount of exposure, *i. e.*, reducing the hours of labor. This reduction is, of course, also the only remedy against the specific evil effects upon the human system of overexertion and fatigue.

A demand which has generally been understood to serve economic or social purposes may thus assume the character of a sanitary requirement, and the confusion of purposes is aggravated by the fact that of all sanitary risks that of a mere prolongation of effort under undesirable conditions is the least tangible, as well as the most variable according to individual constitutions, and that the legal maximum of duration of work must be more or less haphazard and arbitrary. The resulting difficulty in the application of constitutional principles is obvious. If the courts are expected to protect the freedom of contract, as the legislature is expected to protect the public welfare, can the mere enactment of a statute be accepted as conclusive as to the requirements of the public health and safety? Up to the present time the courts have not succeeded in evolving any definite theory with reference to this problem; it is a matter of speculation whether in a given case they will acquiesce in the legislative judgment or override it.

Toward legislation limiting the hours of labor of women the attitude of the courts has on the whole been favorable. Ten-hour laws have been sustained in Massachusetts, Pennsylvania,

Nebraska, Washington and Oregon, and the Oregon decision has been affirmed by the Supreme Court of the United States. Against these decisions must be set that of the supreme court of Illinois, rendered in 1895, declaring an eight-hour day for women to be unconstitutional. A ten-hour law, modeled upon that of Oregon, was enacted in Illinois in 1909, and a case involving its constitutionality is now awaiting the decision of the supreme court of the state.[1] The decision in the earlier Illinois case has been much criticized, and the opinion contains statements which at the present day would find the approval of few courts. Stripped of superfluous dicta, and reduced to its vital points, the decision stands for two things: that the adult woman is entitled to the same measure of constitutional right as the adult man, and that the court did not believe that an eight-hour day was a sanitary requirement even for women. "There is no reasonable ground," the court said, "at least none which has been made manifest to us in the arguments of counsel, for fixing on eight hours in one day as the limit within which woman can work without injury to her physique, and beyond which, if she work, injury will necessarily follow."

This skepticism should not cause great surprise or indignation. Notwithstanding the rapid change of opinion within the last two decades in favor of restricting the hours of labor of women, an eight-hour maximum day for women workers is even now unknown in America or in Europe, and in Germany it took eighteen years, from 1892 to 1910, to reduce the workday of female factory hands from eleven to ten hours. It is easy to understand that a compulsory eight-hour day in 1893 or 1895 should have appeared to the court as an unreasonable and even arbitrary interference with private rights. To say the least the case for such a measure had not yet been made out.

The limitation of the hours of women workers had become a part of English factory legislation as early as 1844. A factory report of the previous year had pointed out that women were physically incapable of enduring a continuance of work for the same length of time as men, and that deterioration of their

[1] Since this article was written the Illinois supreme court has declared the ten-hour law constitutional.—Editor.

health was attended with far more injurious consequences to society.[1] The need of hygienic protection had thus been brought to the attention of the legislature. At the same time the economic aspect of the measure appears to have been the more prominent. The men desired shorter hours for themselves, but thought an appeal to parliament hopeless; thus women and children were put forward in the hope, which events justified, that the legal reduction of their worktime would accomplish without legislation the same purpose for men.[2] The agitation was in fact conducted as one for shorter hours all around, although the bills as drawn did not include adult men. There appears on the other hand to have been some apprehension on the part of women that the men sought to impose restrictions upon them to make them less desirable employes and thus crowd them out of work, and for a long time the equal treatment of adult women and men was demanded by the leaders of the women themselves.

Factory legislation, as first conceived, was to apply only to those who were not free agents, namely to children. True, the married woman was not legally a free agent, but she was struggling for emancipation, which eventually came, and the female sex as such labored under no disabilities. Prominent economists urged that the state had no business to dictate to the adult woman the terms of her employment. But the exclusion of woman from underground mines paved the way for her subjection to state control, and the act of 1844 put her in the same class with children and young persons. The separate and distinct treatment of women thus became an established feature of English factory legislation.

In America the sanitary or hygienic argument in the movement for limitation of hours of female labor in factories was prominent from the beginning. The legislation in Massachusetts enacted in 1874 had been preceded by official investigations and reports concerning the detrimental effect of long hours upon the constitution of women. If woman was to be accorded the fulness of individual liberty and equality with man,—and barring

[1] Hutchins and Harrison, *History of Factory Legislation*, p. 84.

[2] *Ibid.*, p. 186.

the denial of the active political franchise, the tendency as manifested in married women's legislation and in admission to business and professional pursuits, was in that direction—a peculiar danger in her case from overwork and a special need of protection had to be made out.

In the earlier judicial decisions sustaining the ten-hour laws for women the existence of this special danger and need was rather assumed than supported by evidence. The argument for the Oregon law before the Supreme Court of the United States for the first time laid all stress and emphasis upon the documentary testimony which had been accumulated in scientific treatises and official publications, showing the evil effects of overexertion and overfatigue upon women employed in the monotonous routine of mechanical labor. In marshaling medical, social and economic, instead of legal authorities, Mr. Brandeis, the counsel for the state of Oregon, clearly recognized that if the principle of freedom of contract is to be accepted as part of the constitution, the validity of the limitation of hours of labor becomes a question of fact, which must be answered upon the basis of observation and experience. The same line of argument was presented still more elaborately (and again by Mr. Brandeis) in the Illinois case.

Attention was called to the extreme monotony of labor attending the minute subdivision of manufacturing processes, to the increasing strain of factory work due to the speeding of machinery, and to the general baneful effects, moral as well as physical, of overexertion and overfatigue. It is impossible to glance over the array of extracts from authoritative sources gathered from different countries without realizing that an entirely new light is thrown upon the subject of long hours in industry, with primary and specific reference to the work of women. A case for the exercise of the police power, even upon its most conservative basis, is made out such as had never before been presented when the validity of labor legislation was at issue. A showing of facts such as this might well induce a court to sanction state interference with the freedom of contract, while insisting to the fullest extent upon the same measure of constitutional right for women and men.

It is a remarkable fact that American constitutional law is still unsettled as to the constitutional equality of women with men, so far as liability to restrictive legislation is concerned. The few judicial utterances on the subject are conflicting. Illinois in the first case of Ritchie *v.* The People[1] made no distinction between men and women with reference to personal rights and the freedom of contract. New York is quite explicit: "Under our laws men and women now stand alike in their constitutional rights, and there is no warrant for making any discrimination between them with respect to the liberty of person, or of contract."[2] On the other hand the supreme court of Nebraska, in sustaining the ten-hour law, frankly speaks of women as wards of the state, and the passage in question is quoted with apparent approval by the supreme court of Oregon; and the Supreme Court of the United States, instead of planting its decision squarely upon the facts presented in the brief for the state of Oregon, mingles considerations drawn from physical conditions with others resting upon the general status of the female sex in such a way as to give an apparent preponderance to the latter. The court, speaking through Mr. Justice Brewer, said:

Still, again, history discloses the fact that woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control in various forms, with diminishing intensity, has continued to the present. As minors, though not to the same extent, she has been looked upon in the courts as needing especial care that her rights may be preserved. Education was long denied her, and while now the doors of the school room are opened and her opportunities for acquiring knowledge are great, yet even with that and the consequent increase of capacity for business affairs, it is still true that in the struggle for subsistence she is not an equal competitor with her brother. Though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right. Doubtless there are individual exceptions, and there are many respects in which she has an advantage over him; but looking at it from the viewpoint of the effort

[1] 155 Ill. 98.

[2] People *v.* Williams, 189 N. Y. 131, 134.

to maintain an independent position in life, she is not upon an equality. Differentiated by these matters from the other sex, she is properly placed in a class by herself, and legislation designed for her protection may be sustained, even when like legislation is not necessary for men and could not be sustained. It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him. Even though all restrictions on political, personal and contractual rights were taken away, and she stood, so far as statutes are concerned, upon an absolutely equal plane with him, it would still be true that she is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions—having in view not merely her own health, but the well-being of the race—justify legislation to protect her from the greed as well as the passion of man. The limitations which this statute places upon her contractual powers, upon her right to agree with her employer as to the time she shall labor, are not imposed solely for her benefit, but also largely for the benefit of all. Many words cannot make this plainer. The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

We have not referred in this discussion to the denial of the elective franchise in the state of Oregon, for while it may disclose a lack of political equality in all things with her brother, that is not of itself decisive. The reason runs deeper, and rests in the inherent difference between the two sexes, and in the different functions in life which they perform.[1]

It is to be noted that the Supreme Court refuses to regard the non-possession of active political rights as a controlling element. Under a system which sets constitutional limitations against the popular will as expressed through the ordinary elective franchise, the treatment of the latter as relatively indifferent has a certain plausibility which would be much more doubtful in England or Germany. If the vote cannot secure shorter

[1] Muller *v.* Oregon, 208 U. S. 412, 421–423.

hours, it may be argued that the absence of the vote cannot be a valid reason for allowing the exercise of the power. If, on the other hand, shorter hours are demanded in the interest of the public, the bestowal of the franchise should not forfeit the benefit of the measure.

From a practical point of view, however, political power is an important, if not in the long run decisive, factor in the economic struggle, and as long as it is withheld from women they have a claim to special protection from the state, which they may put forward as a requirement of justice, without conceding that their status is naturally one of dependence and inferiority.

There is another argument in favor of a larger state interference with the freedom of contract in the case of women than in that of men, which has received little attention, but seems to deserve consideration.

The whole doctrine of freedom of contract is based upon a theory of constitutional equality which is frequently belied by the facts. What saves the theory from being altogether a fiction, is the possibility of contracting on something like equal terms through the power of collective bargaining. The doctrine of freedom of contract stands and falls with the efficacy of the organization of labor. If for any reason, such organization is impossible or ineffective, the right of the state to exert its power in favor of tolerable economic conditions cannot in reason be disputed, even though considerations of expediency or wisdom may make its exercise undesirable.

In the past, women workers have been greatly inferior to men in the power of effective organization. It remains to be seen whether this inferiority will be permanent. Considering the fact that most women enter industrial work as a temporary occupation which they expect to give up for matrimony, and that the care of the household and family is still regarded as their normal and proper function, it is not surprising that there should be much less opportunity and inducement for organization among women than among men. And if this should prove to be a necessary limitation, it would constitute a justification for the exercise of state control, which in the case of men may be found to be absent or to be confined to particular employments.

When we examine the labor laws of Massachusetts and other states, in which women are so commonly classed with young persons we might be tempted to conclude, that as on the one hand the state claims absolute control over children, and on the other hand is careful to respect the constitutional rights of adult men, there is manifested a consciousness of a power, not absolute, but transcending the normal measure, equally exercisable over those beyond the age of childhood and below full maturity, and over women. Upon closer scrutiny it will however appear that there are extremely few cases in which special legislation for women is of a purely economic character. The provision of the Massachusetts law[1] forbidding deductions from the wages of women (and minors) in case of the breakdown of machinery if they are refused the privilege of leaving the mill while the damage is being repaired, is one of the rare instances in point. Generally the common protection accorded to women and young persons is quite capable of being explained upon the basis of physical differences between adult men and adult women, and it is not therefore necessary to have recourse to the greater justification of special economic protection. The case may be somewhat different in English and German legislation.

From a constitutional point of view it makes a considerable difference whether the exercise of special power over the individual is based upon his supposed dependency and inferiority of right, or is due to special conditions in no way derogatory to his civil status. It is one thing to quarantine a smallpox patient, another thing to detain an alien at an immigrant station. When measures shall be proposed for the control of women in industry upon a principle different from any applied to men, it will be time to inquire whether she is to be measured by different and inferior political standards. The laws that have been so far enacted for women involve, with rare exceptions, no such discrimination.

The specific evil effects of long hours of standing upon female organs have long been recognized; so there is assumed to be a difference in nervous structure, and a greater suscepti-

[1] R. L., 106, § 69.

bility, in consequence of this, to the exhaustion of prolonged work. The indirect danger of diminished strength and vitality of possible offspring involves a supreme interest of the community at large, for which there is no parallel in the case of men, and which must satisfy the demands of the strictest constitutional constructionist.

The prohibition of night work in factories has in the case of younger women, at least, the justification of moral protection;[1] and while, upon an assumed constitutional equality of both sexes, such total prohibition is less easily explained as regards women of mature age, it is probably possible to establish a case of social or physical desirability of the restriction in their favor.

It might be said that the prohibition of women's work on specially dangerous machinery presents a case where the tutelary care of the state is simply pushed one step farther than in the case of men; but even here a specific danger is traceable; for it appears that the first provision of that kind in England was due to the suggestions of factory inspectors who pointed out to the parliamentary committee that the customary dress of girls and women made them especially liable to be caught by machinery.[2]

There are undoubtedly other matters in which protective legislation for women might be extended for reasons not involving any deficiency of constitutional status. Without indulging in speculation regarding social needs or moral dangers, we may point to the provisions of the German trade code, which recognize the special needs of working women. The right given to women who manage their household, to ask for an extra half hour at noon, if the period of noon rest is less than an hour and a half, is probably, like all other privileges made dependent upon special request, of little practical value. The rule that

[1] "The moral dangers of night work are so obvious that they need only be mentioned: the danger of the streets at night, going to and from work, association with all kinds of men employes at late night hours; the difficulty for women who are away from their families, of living at respectable places and entering at night hours; the peril of the midnight recess in establishments that run all night long." Josephine C. Goldmark, *Annals American Academy of Political and Social Science*, v. 28, p. 64.

[2] Hutchins and Harrison, p. 85.

women must not be employed after five o'clock in the afternoon on Saturdays and the eve of holidays, is, however, mandatory, and is likewise clearly dictated by a regard for household duties. Above all there is the prohibition of employment before and after confinement, altogether for eight weeks, the return to work requiring proof that at least six weeks have elapsed since confinement. In accordance with the recommendations of the Berlin Conference of 1890, England in 1891 likewise placed a restriction upon the employment of women for four weeks after childbirth, but the enforcement of the law seems to suffer from administrative difficulties.[1]

The present scarcity of similar legislation in this country seems to be due, not so much to constitutional doubts or difficulties, as to the fact that there does not appear to have been the same demand, or perhaps, owing to the less common employment of married women, the same occasion for such a restriction. Should the necessity for such legislation arise there ought to be no fear that the constitutions stand in the way of appropriate and adequate protection. Our present statutes by no means exhaust the permissible field of state interference.

## III

If the validity of some particular form of regulation for a particular purpose be conceded, another difficulty arises in determining the proper range and scope of the proposed law. The equal protection of the laws guaranteed by the fourteenth amendment does not demand a mechanical equality of treatment of all persons irrespective of the conditions of their occupation or employment; but this equality is inconsistent with arbitrary or partial discrimination. Ever since the Supreme Court of the United States declared the Illinois anti-trust law unconstitutional, because it made an exception from its prohibitions with reference to agricultural products or live stock in the hands of the producer or raiser,[2] there has been a feeling of uncertainty as to the extent of permissible classification. The tendency of the federal Supreme Court has been on the whole to

[1] Hutchins and Harrison, pp. 209–211.

[2] Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540.

concede to state legislatures a considerable latitude in the selection of objects of police restraint; but the risk of contest on this ground is a factor to be reckoned with in framing any restrictive legislation. Some of the states, as Illinois, are inclined to apply the principle rather strictly against the singling out by statute of certain groups, when other groups might be liable to similar dangers or evils.

The categories which we find mentioned in the American statutes restricting the hours of labor of women, are factories (by this or some other equivalent designation), mechanical establishments (not clearly differentiated from factories), mercantile establishments, laundries, hotels and restaurants. In most of the states having laws on the subject only some of these are covered. No law has as yet undertaken to regulate with particular reference to women either industrial home work or domestic or semi-professional service. Only one state (Oregon) includes the important transportation and transmission employments, especially the telephone and telegraph service, in which so many women are engaged, while Montana confines its restriction to the public telephone service. Up to the present time no law relating to women's work has been declared unconstitutional by reason of the specification of particular employments; the law sustained by the Supreme Court of the United States applied to manufacturing and mechanical establishments and laundries. It seems reasonable enough to differentiate these employments from those in which there is an element of personal service, such as waiting on customers or rendering direct assistance to the employer, and which are therefore free from the monotonous routine of purely mechanical work. It might be difficult on the other hand to justify the omission of such work as dishwashing or scrubbing in restaurants or hotels. Again, where the restriction applies to employment in mechanical, but not in mercantile establishments, a question might be raised concerning the clerical positions of both classes which are filled by women, and which are subject to different treatment, while not differing in the character of the work done. The difficulty can perhaps be avoided by construing the statute as applying only to mechanical employments in mechanical establishments.

Where, as in Missouri, the law is limited to cities above a certain size, it may be argued plausibly that the loss of time in going to and from work in large cities is apt to be considerable and may be taken into account in determining the territorial application of the law.

Another difficulty is presented by the demands created by conditions of emergency or an exceptional pressure of business. In condemning the New York ten-hour law for bakers, the Supreme Court of the United States referred disapprovingly to the absence of an emergency clause. On the other hand the constitutionality of the fifty-four-hour law for women of the state of Michigan is said to have been attacked on the ground that it makes an exception for employment in preserving perishable goods in fruit and vegetable canning establishments. Massachusetts allows a limited amount of excess work in seasonal industries, and the same is true under the German law.

The following comment by the New York commissioner of labor[1] on the New York law regulating the hours of women is instructive in this respect:

In its original bill form this act made an exception, adopted from the English law, in favor of factories manufacturiug perishable and seasonal articles or the products of such articles, and allowed them to employ females over 18 for sixty-six hours a week in not to exceed six weeks a year. Similar exceptions are contained in the laws of almost all the nations of Europe and are permitted by the recent international labor treaty signed at Berne. They are based upon necessity and equity and are consonant with health, for the reason that in such industries limited overtime during rush periods or seasons would be counterbalanced by reduced hours in slack periods or seasons. But the provision aroused such a violent public protest that it was temporarily abandoned. That was the cause of great regret to me, for I believe that the health provisions of our factory laws should be limited to the reasonable requirements of health, and that particular industries should not be unnecessarily and unreasonably embarrassed for the sole purpose of keeping a regulation general and uniform. In those industries where the supply of the raw material, the fitness of the material or the ability to work is determined by the weather, it is impossible to divide the week, the month

[1] *Report* 1907, p. 49.

and the year into working days or weeks of approximately equal duration, as our law presupposes; and it is not a necessary or even a reasonable health regulation that forbids time lost by such cause to be in any degree made up when the weather permits. Reasonable variations from the more regular limitations imposed upon those industries in which work is or can be made regular should be allowed for those in which it cannot. I do not want to be understood as condoning the excessive hours per day and per week that are now occasionally worked in those factories to which such an exception would apply. On the contrary they should be sharply restricted according to health requirements. But I believe that if those factories were allowed such variations from the general rule as would not be injurious to health, it would render the law more easily and generally enforcible as to them and would in fact reduce their hours of labor, and it would avoid the danger of an adverse decision from the courts as to the constitutionality of the provisions limiting the hours of women's labor.

It is not easy to see why any emergency provision should be regarded as in itself violating the principle of equality, but there may be some danger in not treating alike different emergencies which are entitled to equal consideration.

The absence of an emergency clause may expose the law to the charge of creating unnecessary hardships and thereby creating an unreasonable interference with liberty. If however in this as in other matters perfect justice and adaptation of means to the end might be thought to require a more minute differentiation than our statutes provide, it should be borne in mind that one very legitimate element in considering the reasonableness of a statute is the possibility or facility of its administration. A certain degree of mechanical uniformity of rules is essential to the successful operation of any act. Experience has demonstrated that it is extremely difficult to control compliance with legal limitations of hours of labor, if the permitted number of hours may be arranged at any time within a range of fourteen or fifteen hours, or if the employer is permitted to employ two shifts of working women, or if he is allowed to distribute 54 or 60 hours through the week as he pleases. On the other hand Dr. Jacobi quotes the labor commissioner of New York as saying: "Except for the administrative reason that it

makes it easier to enforce the prohibition against overtime, there is no present necessity in this state for the prohibition of night work by adult women. On the other hand, if enforced, it would deprive some mature working women, employed by night only at skilled trades, for short hours and for high wages, of all means of support. And the prohibition, in its application to factories only, seems rather one-sided when we consider that probably the hardest occupations of women, those of hotel laundresses and cleaners, are not limited as to hours in any way."[1] The relevancy of administrative considerations has received very little judicial discussion in connection with the problem of discrimination, and deserves serious consideration. While important rights should not be allowed to be sacrificed to mere official convenience, effectiveness and even the cost of administrative supervision should be regarded as legitimate factors in determining the reasonableness of restrictive measures.

The whole problem of discrimination depends so much upon the varying conditions of different industries that an intelligent judgment of what is legitimate and what is arbitrary is possible only upon the basis of a close study of facts. There ought to be some guaranty that legislation in this respect shall proceed upon a careful and impartial survey of all relevant conditions, and in the notorious absence of such guaranties, the courts may well demand to be convinced that discriminations are not arbitrary, and that the denial of exemptions is necessary from an administrative point of view. It is a further question whether it is possible for the legislature to do full justice to the varying needs of industries by making direct provision for all cases, or whether powers of dispensation or permit must not be vested in administrative authorities. Such powers should not go beyond the province of what constitutes, properly speaking, administration. As soon as they assume the character of subsidiary regulations, there arises a constitutional difficulty in the principle that legislative powers must not be delegated. A statute of California which left it to the judgment of the labor commissioner to determine whether the inhalation of noxious gases could be prevented by the use of some mechanical con-

[1] *Charities and the Commons*, v. 17, p. 839.

trivance, and if so, to direct its installation, was on that ground declared unconstitutional.[1] There are also, however, decisions sustaining the delegation to administrative authorities of the power to specify standards in pursuance of a general policy indicated by the legislature.[2] At present it is not clear to what extent the delegation of powers of regulation can be safely carried, nor is it probably in accordance with prevailing sentiment that it should extend to provisions that can be dealt with intelligently and effectually by legislation.

## IV

Attention has been called to the conflicting views of the courts of New York and Illinois, and the federal Supreme Court, with reference to the constitutional rights of women. Similar differences may appear with regard to drawing the line between legitimate and arbitrary discrimination. It is important to observe that the more liberal view in favor of the legislative power held by the Supreme Court of the United States is not binding on the states. It is different where the state courts take the more liberal view. When the Supreme Court decided that a ten-hour law for bakers violated the fourteenth amendment, the New York law fell, and similar legislation in all other states was invalidated or made impossible. If the Supreme Court should decide, as it probably would, that the prohibition of night work of women does not violate the fourteenth amendment, the court of appeals of New York, while it might revise and overrule its own decision to the effect that such prohibition is invalid, would not be bound to do so, but would have the right to insist that the constitution of New York protects individual right against legislative power more effectually than does the federal constitution. And so it is well understood that the supreme court of Illinois, in passing upon the validity of the ten-hour law of that state, copied from the law of Oregon which

[1] Schaezlein *v.* Cabaniss, 135 Cal. 466.

[2] Buttfield *v.* Stranahan, 192 U. S. 470, standards of quality of tea; Isenhour *v.* State, 157 Ind. 517, minimum standards of food and drug preparations, defining specific adulterations; Arms *v.* Ayer, 192 Ill. 601, determining number and location of fire escapes.

the Supreme Court of the United States sustained, is not bound, though it may be properly influenced, by that decision; the federal authority is persuasive, but not controlling. This results from the fact that the fourteenth amendment was enacted as a protection against the abuse of legislative power, and is not concerned with legislative inaction or impotence, induced by the construction which the state courts put upon the state constitution.

In such cases the people of the state have it in their hands to remove the opposition of their judiciary, by amending their state constitution so as to permit the desired legislation. This was done in New York with reference to legislative control of labor performed in connection with state and municipal works, and in Colorado, with regard to hours of labor in specified occupations and other branches of industry which the legislature might deem injurious to health. So the new constitution of Michigan provides (art. V, § 29) that the legislature shall have power to enact laws relative to the hours and conditions under which women and children may be employed. If such constitutional amendment is adequately framed and the new legislation conforms to its provisions—in Colorado the supreme court held that an eight-hour law for women enacted after the amendment fell short of satisfying the requirements of the amended constitution[1]—there is nothing but the federal constitution that can be superior to the new law. If the federal Supreme Court has held that such a law does not violate the federal constitution, the construction must be binding upon the state court. True, if the state court should presume to place upon the federal constitution a construction more unfavorable to legislative power than the federal Supreme Court, there would be no possibility, under the federal statutes, of reviewing or reversing that decision, but it is almost inconceivable that a state supreme court should take such a position and override the most authentic and authoritative interpretation of the highest law of the land, provided by that law. As a matter of fact, such a course has never been taken, and need not be apprehended.

It is one of the dominant features of our constitutional sys-

[1] Burcher *v.* People, 41 Colo. 495. The reasoning of the decision is in some respects obscure, and the case cannot be regarded as typical.

tem that the nation, except for the regulation of interstate and foreign commerce, has debarred itself from the active and positive care of social and economic interests. The other great federated commonwealths of the world have more liberal provisions in this respect. Germany has assigned to the imperial power the whole subject of trade and industry; the Swiss constitution of 1874 mentions as subjects of federal legislation hours of labor and the care of health in factories; in Canada the Dominion is given residuary powers which cover the bulk of industrial legislation, and Australia by a wise provision allows any two or more of the states to refer to the federal parliament any matters to be regulated for the referring states jointly. The United States has by its constitution undertaken to safeguard individual right as an immunity from governmental oppression, but not as an immunity from private exploitation which falls short of reduction to practical servitude. Congress cannot enact protective measures for women in industry applicable to the nation at large. Its position is in this respect the same as with regard to child labor. It has been suggested that the United States might and should debar products manufactured by child labor from interstate or foreign commerce, and if this were practicable, women's work might be controlled in the same way. Such a legislative contrivance would violate the spirit, if not the letter, of the constitution, and on that account would meet with strong and legitimate opposition.

It is undoubtedly an anomaly, that our arbitrary and artificial state lines should stand in the way of such uniformity of industrial control as competitive industrial conditions may demand. A certain measure of unity may perhaps be achieved by the hitherto untried method of legislative agreements between several states, subject to the consent of Congress. But under the limitations of state constitutions, such unity would be a precarious thing, and its possibility has hardly been discussed.

Considering the action taken by the International Conference on Labor Regulation at Berne in 1906 in regard to the night work of women, the question suggests itself whether the treaty-making power might not be used for the purpose of securing national protection of women in industry. The Berne conven-

tion provides that the industrial work of women at night shall be prohibited, with a specification of the number of hours, and subject to certain exceptions particularly set forth. Suppose the United States had been a party to this convention, what would have been the effect? Under the federal constitution, the treaties are the highest law of the land, and treaties of the United States sometimes deal with subjects otherwise withdrawn from federal jurisdiction and belonging to the states, so especially with the right of aliens to hold land. But these treaty provisions are directly operative without further legislation. This does not appear to be true of the Berne Convention. For although the convention regarding night-work uses the word "shall be prohibited" (*sera interdit*) while the phosphorus convention says the parties "bind themselves to prohibit" (*s'engagent à interdire*), yet even the night-work convention leaves it to the signatory states to define what shall be regarded as industrial enterprises, and therefore is not operative without further legislation. For the United States the convention would therefore have been ineffective without the concurrent action of each state. Even however if a convention should create immediately operative restraints, they would probably be ineffective in practice without appropriate administrative arrangements, and these, under the constitution, can be provided only by the states. On the whole, the treaty-making power can hardly be relied upon to break down the barriers created by state autonomy.

Fortunately, however, the work of agitation and public education knows no state lines, and the national influences which are thus constantly operative cannot fail to produce a certain uniformity of legislation which will increase as the wisdom of restrictive or regulative measures approves itself by their success. In the work of public enlightenment, the federal government can and does bear its share, since the expenditure of national funds is not bound by the same limitations as the enactment of laws intended to bind private action, and since the constitution, through the provision for the census, lends a direct sanction to inquiries into social and economic conditions. For the present, these non-compulsory agencies must be relied upon as the main forces in the work of unification.